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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 351

DR. CARLOS MANUEL FALLA Y ALVAREZ,
Petitioner,

vs.

PAN-AMERICAN LIFE INSURANCE COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For The Fifth Circuit.

OPINIONS BELOW

The opinion of The United States Court of Appeals for the Fifth Circuit is reported at 374 F.2d 92. This

NOTE: Unless otherwise indicated, all emphasis is supplied.

opinion reverses the final judgment of the United States District Court for the Southern District of Florida which appears at R. 247-248 of the printed record in the Court of Appeals. The District Court's Findings of Fact and Conclusions of Law appear at R. 240-246 of the printed record in the Court of Appeals.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). Petitioner's timely petition for rehearing in the Court of Appeals was denied on April 4, 1967.

QUESTIONS PRESENTED

Respondent cannot accept the petitioner's statement of the Questions Presented. Both of petitioner's questions are based on incorrect versions of the record. The questions which were decided below may be fairly and accurately stated as follows.

1. Where an insured makes no contention on the trial level that a monetary agreement to a life insurance contract was improperly executed and the trial court finds the agreement was part of the insurance contract, may the insured, without cross-assigning error, claim for the first time on appeal that the agreement was not properly executed by the insurer?

2. Where a written life insurance contract provides for payment in Cuban pesos, does the insured's oral testimony that it was payable in United States dollars preclude the trial court

from finding as a fact that such contract was payable in pesos?

STATEMENT OF THE CASE

Petitioner sued the respondent to recover the cash surrender values and accumulated dividends on six life insurance policies (R. 7-10). Two of the policies were originally issued as peso policies and the remaining four policies were converted into peso policies by monetary agreements executed in 1952. In this regard, the trial court found the facts as follows:

"2. The following policies are involved:

(a) Policy 254-900 was issued under date of February 23, 1964. The initial premiums were paid in Dollars. The cash surrender value of this policy is $995.00.

(b) Policy 324-766 was issued April 14, 1939. The initial premium was paid in Dollars. The cash surrender value of this policy is $3,114.00.

(c) Policy 387-428 was issued March 16, 1944. The initial premium was paid in Dollars. The cash surrender value is $14,346.00.

(d) Policy 414-798 was issued April 25, 1946. The initial premium was paid in Dollars. The cash surrender value is $619.00.

(e) Policy 441-506 was issued August 4, 1947. The initial premium was paid in Dollars. The cash surrender value is $8,500.00.

(f) Policy 636-489 was issued March 19, 1959. The initial premium was paid in Cuban pesos. The cash surrender value is $7,347.00.

3. The applications for all the policies were made in Cuba. The applications and the policies when issued were all in the Spanish language. In each case the applications were sent to the home office of the defendant in New Orleans, Louisiana and were there accepted and the policy issued. The policies were then forwarded to the Cuban agent of the Company in Cuba who authenticated the signature of the Company officers before a Cuban Notary before delivery to the insured.

4. The four policies, earliest in date (listed as (a) through (d) above) were all originally United States Dollar contracts with premiums and benefits payable in New Orleans at the company's home office. The latter two policies (listed as (e) and (f) above) were Cuban peso contracts payable in Cuba. In 1952 at various times, the four dollar contracts were amended by monetary agreements executed by the parties as follows:

> 'In consideration of the Pan-American Life Insurance Company accepting payments of the premiums on the above numbered policy in Cuban Currency and in Cuba, in lieu of the payment of United States Dollars in New Orleans, Louisiana, it is requested that my policy be amended so that all premiums, all benefits

> and all claims payable under its terms be demandable and payable in the National currency of Cuba in Havana, Cuba **on the basis of one Peso for each Dollar** (emphasis added), required by the contract, and it is agreed that upon receipt of this request by the Pan-American Life Insurance Company, it shall become a part of the contract between the undersigned and the Company.'" (R. 241-243).

Having found all six policies to be payable in pesos, the trial court then entered judgment for the insured (R. 247-248) which, as stated by the Court of Appeals below:

> ". . . require[d] the defendant to pay Dr. Alvarez an American dollar for each peso owed in Cuba on the theory that the 'official exchange rate' required this, notwithstanding that the Cuban Peso was worth considerably less than a dollar at all times pertinent. . . . " 374 F.2d at 93.

Respondent appealed to the Fifth Circuit which reversed on the authority of its earlier decision in PAN-AMERICAN LIFE INSURANCE COMPANY v. ZABALETA, (5th Cir.1966), 362 F.2d 167. With reference to petitioner's claim that the monetary agreements were not properly executed, the Fifth Circuit said:

> "Dr. Alvarez does not attempt to answer ZABALETA. He claims that the peso monetary agreements were not properly executed. But this issue was not raised below and cannot be raised for

> the first time on appeal. Even had the issue been raised below, the failure of Dr. Alvarez to cross-assign error as to the district court's finding that the monetary agreements were properly executed precludes consideration of such contention on appeal. North Texas Producers Ass'n. v. Metzger Dairies, Inc., 5 Cir. 1965, 348 F.2d 189." 374 F.2d at 93-94.

As the record shows (R. 62-66, 70-71, 113), petitioner's only contention concerning the monetary agreement on the trial level was that it was invalid for want of consideration. The record likewise shows that petitioner filed no cross-assignments attacking the trial court's finding that the monetary agreements were "executed by the parties" (R. 242).

REASONS FOR DENYING THE WRIT

Respondent urges the Court to deny the petition for a writ of certiorari for the following reasons:

1. The record shows that neither question petitioner attempts to raise is actually before the Court.

2. The Fifth Circuit's opinion below is correct, does substantial justice between the parties, and passes on no issue which should be reviewed by this Court.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, was mailed to the attorney for Petitioner, SAMUEL SHERADSKY, ESQUIRE, 1895 S. W. Third Avenue, Miami, Florida 33135, this 14th day of July, 1967.

JAMES A. DIXON